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December 2, 2020

Via ECF

Honorable Lewis J. Liman
United States District Judge
Southern District of New York
500 Pearl Street
New York, New York 10007

Re: HC2, Inc. v. Andrew Delaney
Civil Action No. 20-cv-03178-LJL

Dear Judge Liman:

This firm represents HC2, Inc. This Court's Order entered November 30, 2020 ("Order"), and December 1, 2020, directed Defendant to file an affidavit or declaration submitting the specific documents that the Amended Counterclaims ("Counterclaims") incorporate by reference. *See* ECF No. 93. Plaintiff writes because Defendant's filing in response to the Order disregards the Order's specific mandate and instead submits additional information not pleaded in the Counterclaims. *See* ECF No. 95.

This Court's Order clearly specified the documents that Defendant was to file. Those documents are the New York City Health Department guidance issued February 14, 2020, Centers for Disease Control and Prevention guidance issued March 2, 2020, Governor Cuomo's Executive Order dated March 7, 2020, and President Trump's speech, as alleged in the Counterclaims' paragraph 14 and Exhibit A. *See* ECF No. 93. The Order specified these documents should all pre-date March 18, 2020. *Id.* Defendant submits these documents as Exhibits 1, 3, 4, and 5 to the Rotman Declaration.

However, Exhibit 2 to the Rotman Declaration improperly submits "NYS Dept. of Health 'Interim Guidance for Procedures When Identifying An Employee with Concerns for COVID-19 Exposures,' dated March 11, 2020." Rotman Decl. Ex. 2, ECF No. 95. Defendant did not plead this guidance in his Counterclaims. He may not raise new allegations in opposition to a motion to dismiss, and he cannot do so now. *See Williams v. U.S. Info. Sys., Inc.*, No. 11 Civ. 7471 (ER), 2013 WL 214318, *4 n.4 (S.D.N.Y. Jan. 17, 2013) (the court may not consider new allegations raised for the first time in plaintiff's opposition to a motion to dismiss.). These new allegations and information should be stricken.

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Defendant also improperly submits other information and argument. The Rotman Declaration cites “NYS Dept. of Labor FAQ’s” and quotes the “DOL [sic]”. Rotman. Decl. ¶ 3. Defendant gives citation for this unpled information via an HTML link to “interim guidance” dated July 17, 2020. This citation clearly post-dates March 18th, and violates both the *Williams* holding, and this Court’s Order. Defendant’s assertions as well as the related citations and quotations should be stricken.

Plaintiff thanks the Court for its time and attention to this matter.

Respectfully Submitted,

OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.

s/ Michael Nacchio

Michael Nacchio
Valerie Weiss

To:
All counsel of record (VIA ECF)

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